

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
415 C.P.W. CO. : DETERMINATION
for Revision of a Determination or for Refund :
of Tax on Gains Derived from Certain Real :
Property Transfers under Article 31-B of the :
Tax Law. :

Petitioner, 415 C.P.W. Co., 585 West End Avenue, New York, New York 10024, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 804322).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on December 10, 1987 at 9:15 A.M. Petitioner appeared by Greenstein & Greenstein, Esqs. (Sol D. Greenstien, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed certain expenses claimed by petitioner as a part of original purchase price in connection with petitioner's transfer of real property.

FINDINGS OF FACT

1. On April 7, 1986, petitioner, 415 C.P.W. Co., filed a Claim for Refund of Real Property Transfer Gains Tax seeking a refund of tax paid under Tax Law Article 31-B ("gains tax") in the amount of \$18,154.70. This claim was based upon petitioner's assertion that certain costs of capital improvements and certain selling expenses (as described hereinafter) had been incurred by petitioner in connection with the ownership and subsequent (January 28, 1985) transfer of property located at 415 Central Park West. These costs and expenses were inadvertently unclaimed by petitioner at the time of its transfer of the premises and initial gains tax filing.

2. In response to the above referenced claim the Audit Division advised petitioner, by a letter dated December 30, 1986, that the claim had been granted to the extent of \$6,154.70 representing tax paid on the claimed additional costs for capital improvements. However, the balance of the claim for refund (\$12,000.00) was denied upon the basis that petitioner's payment of New York State Transfer Tax in the amount of \$20,000.00 and New York City Transfer Tax in the amount of \$100,000.00 in connection with the transfer of the property did not constitute selling expenses includable as part of petitioner's original purchase price for the property.

3. In turn, petitioner timely commenced this proceeding to contest the disallowed portion of its refund claim. There is no dispute as to the dollar amounts of costs incurred or the amount

of refund (\$12,000.00) which would result if said expenses were deemed allowable as selling expenses. Thus, at issue is whether said expenses are allowable under Tax Law § 1440.5(a) as "customary, reasonable and necessary legal, engineering or architectural fees" incurred in selling real property.

SUMMARY OF THE PARTIES' POSITIONS

4. Petitioner asserts that the two expenses in question are not only customary expenses, but are legally necessary expenses which must be paid in order to transfer to a purchaser a deed acceptable for recording. Petitioner thus maintains that the expenses are legally required fees and hence are allowable within the meaning and intent of Tax Law § 1440.5(a).

5. The Audit Division asserts, by contrast, that the statute in question (Tax Law § 1440.5) specifically makes allowance only for legal, architectural and engineering fees. The Audit Division notes that the two items in question are not among those items listed as customary fees acceptable under either Tax Law § 1440.5(a) or 20 NYCRR 590.17 promulgated with respect thereto. Thus, the Audit Division takes the position that the term "legal fees" means only attorney's fees and does not encompass the expenses at issue herein.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a tax at the rate of 10% upon gains derived from the transfer of real property within New York State. Tax Law § 1440.3 defines "gain" to mean "the difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price".

B. Tax Law § 1440.5(a), as in effect at the time of the transfer herein, defined "original purchase price" as:

"the consideration paid or required to be paid by the transferor; (i) to acquire the interest in real property, and (ii) for any capital improvements made or required to be made to such real property, including solely those costs which are customary, reasonable, and necessary, as determined under rules and regulations prescribed by the tax commission, incurred for the construction of such improvements. Original purchase price shall also include the amounts paid by the transferor for any customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property..., as such fees...are determined under rules and regulations prescribed by the tax commission." (Emphasis added.)

C. Prior to the September 4, 1984 effective date of Chapter 900 of the Laws of 1984, the language quoted above which specifically allows a transferor to add to its original purchase price those "customary, reasonable and necessary legal, engineering and architectural fees incurred to sell the property" was not included in Tax Law § 1440.5(a), or elsewhere in Article 31-B, and the only (selling) expense statutorily allowable to a transferor was the reduction of consideration for any (customary) brokerage fees related to the transfer if paid by the transferor (see Tax Law § 1440.5[a]).

D. As the above-quoted statutory section (Tax Law § 1440.5[a]) makes clear, the Legislature has drawn a distinction between the costs of selling versus the costs of acquiring an interest in real property. The language allowing costs of selling, essentially as add-ons to the costs incurred to acquire the interest, has been drawn in a very limited fashion. It is not insignificant that those items of expense allowed a transferor as an addition to its original purchase price are stated both in the statute (and in the related regulation) to be "legal, engineering and architectural fees" (emphasis added), as opposed to "legally required fees". The conclusion inescapably resulting is that it is professional fees which the Legislature intended to allow as selling expenses includable in original purchase price. Accordingly, it follows that neither the New York City Transfer Tax nor the New York State Transfer Tax may be added to petitioner's original purchase price as allowable selling expenses within the meaning and intent of Tax Law § 1440.5(a) and 20 NYCRR 590.17.

E. Any reliance upon 20 NYCRR 590.15(b), which provides specifically that certain items such as those at issue herein may be included as part of original purchase price when paid for by a purchaser, is misplaced. The costs of said items, when borne by a purchaser, represent part of that purchaser's expenditures to acquire the interest in real property, and such expenses are clearly allowable as part of the consideration paid or required to be paid to acquire the interest. As explained above, this distinction between costs incurred to acquire an interest in real property versus selling costs is allowable as within the terms of the statute as drawn.

F. That the petition of 415 C.P.W. Co. is hereby denied in all respects, and the partial disallowance of petitioner's claim for refund is sustained.

DATED: Albany, New York
May 19, 1988

_____/s/_____
ADMINISTRATIVE LAW JUDGE